Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-666

VESCO & CO., INC.
Petitioner,

v.

INTERNATIONAL CONTROLS CORP.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

PETITION FOR A WRIT OF

CERTIORARI TO THE UNITED STATES COURT

OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vesco & Co., Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 3, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 556 F.2d 665 (1977) and is set forth at page 1 a of the Appendix included herein.[1] The order

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1. Citations to the Appendix to this petition are in the form "App___a." A certified copy of the joint Appendix printed for the use of the Court of Appeals below will be furnished to the Clerk of this Court upon request. References to it are in the form "App. 76-7580:__a." References to portions of the record that were printed in a prior appeal in the instant action are in the form "App 75-7548:__a." A certified copy of such prior appendix will be furnished to the Clerk of this Court upon request.

of the District Court in International Controls Corp. v. Vesco dated November 1, 1976 73 Civ. 2518 (SDNY) is unreported. App. 12 a

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered June 3, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1). On August 29, 1977, this Court granted an extension of Petitioner's time within which to petition for certiorari to October 25, 1977.

QUESTIONS PRESENTED

1. Whether it comports with Due Process for the District Court to deny Petitioner's motion under Rule 60(b) of the Federal Rules of Civil Procedure when the failure to file a timely appeal was the result of counsel's understandable confusion regarding statements by the Clerk of the Court of Appeals and an appeal by either party was a certainty in light of the history of this litigation?

2. Whether it comports with Due Process when, after a default judgment was entered against a shareholder of Petitioner, the District Court determined that Petitioner was the "alter ego" of the shareholder and deprived the Petitioner of the right to interpose defenses available to the defaulting shareholder or

otherwise to be heard on the merits and entered an execution order against Petitioner in the amount of $2,422,466.72?

3. May a plaintiff recover damages for violation of Rule 10(b)(5) upon a partial final judgment certified pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, where nc evidence that would relate the claims for relief to the purchase or sale of a security has ever been introduced?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

U. S. Constitution, Amendment V provides, in pertinent part:

> ***[nor shall any person] be deprived of life, liberty, or property, without the due process of law.***

Federal Rule of Civil Procedure 60(b)

provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominatd intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant

> relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram norbis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Section 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. §78j(b)

provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange....(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10(b)(5) (17 C.F.R. §240.10b-5) promulgated by the Securities and Exchange Commission pursuant to Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:
>
> (a) To employ any device, scheme or artifice to defraud.
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction and the Institution of the Action

Respondent, International Controls Corp. ("ICC"), instituted this action on June 7, 1973. The complaint alleged generally that many of the named defendants, although not the petitioner, Vesco & Co., Inc. (the "Company"), did by means of interstate commerce and the national securities exchanges, defraud respondent and its stockholders in violation of the Securities Exchange Act of 1934 (15 U.S.C. §78aa et seq.). This alleged violation of the securities laws is the sole basis for federal jurisdiction in this case.

2. Prior Proceedings

On June 7, 1973, ICC filed a complaint against many defendants alleging violations of the federal securities law,

as well as misappropriation of corporate assets and other common law wrongs (73 Civ. 2518). The allegations centered around two general series of events, to wit:

(1) certain transactions by those designated in the complaint as "Vesco and his group" and other alleged aiders and abettors regarding assets and funds of I.O.S. and other related companies; and

(2) certain other transactions by the same persons involving a Boeing 707 airplane.

Preliminary injunctive relief was secured by ICC, and the Company and other defendants filed motions challenging such relief, jurisdiction, and the sufficiency of the pleadings. See International Controls Corp. v. Vesco,

490 F.2d 1334 (2d Cir. 1974) cert. den. 417 U.S. 932 (1974). During the course of those proceedings, it was made clear that ICC would attempt to enforce against the Company any judgment it secured against Robert L. Vesco ("Vesco") and, at all stages, the Company sought to preserve its rights to be heard on the merits of any claims which ultimately would result in an attack on its assets.

The Company timely filed an answer to the complaint after its motion to dismiss was denied and its appeals therefrom dismissed. The Company denied the allegations of fraud or misappropriation of corporate assets as may have been asserted against it, claimed lack of knowledge or information sufficient to ascertain the truth or falsity of the remaining allegations and asserted that the Court lacked jurisdiction over the subject matter of the action. On

September 7, 1973, plaintiff-respondent filed an amended complaint adding new causes of action (some of them against Vesco) and joining additional defendants. There has been no finding that the amended complaint has ever been served upon Vesco (although an affidavit of service was filed by ICC), and no default upon the amended complaint has ever been entered with respect to him.

On October 5, 1973, a default on the original complaint was entered against Robert L. Vesco, individually, which was eventually followed by inquest, setting damages at $2,422,466.72 and a determination by the District Court that the Company was the "alter ego" of Vesco. Final judgment, from which the Company appeals (app. 76-7580-125a),refers to the claims set forth in the Second Count of the Complaint and so much of the Third [through] Ninth and

Eleventh Counts as relate to claims arising out of (i) a dividend in kind of the outstanding shares of Fairfield General Corp. ("Fairfield") to all of the stockholders of ICC pari passu, declared by ICC in late 1970 [sic] (apparently 1972); (ii) a purchase by Skyways Leasing Corp. ("Skyways"), a subsidiary of Fairfield, with funds borrowed from ICC, of a Boeing 707 in June 1971; (iii) a lease between ICC and Skyways relating to the Boeing 707 and (iv) monies paid by ICC in connection with Vesco's use of the plane.

Examination of the complaint indicates that the Second Count refers to all four of the above matters and each of the remaining counts, which form part of the judgment, incorporate the same factual basis and stress different

legal theories of recovery. The Complaint alleges that a dividend pari passu to all stockholders of the stock of the airplane owning subsidiary somehow gave Vesco greater lattitude to acquire control of I.O.S. Ltd. for his own nefarious purposes. The Complaint failed to allege any facts which support this conclusion or the conclusions that the dividend itself damaged ICC or its stockholders. At the inquest to determine damages, ICC established only that it was owed funds for the purchase and use of the airplane, a classic allegation of misuse of corporate assets cognizable under state law.

The Company was named in the caption of the action, appeared for identification in paragraph 5(r) of the Complaint as a corporation "to which defendant Vesco and his children [non defendants] have transferred certain of

their assets", and then was not mentioned again in any of the counts of the complaints.

On April 8, 1974, ICC filed a complaint against Robert L. Vesco in another action (74 Civ. 1588). Again, a default was entered against Vesco, and the Company (not a named party therein) sought to intervene to be heard on the issues of liability and damages. The trial court (Judge Stewart) denied intervention, assuring counsel that the Company would have its opportunity to be heard if ICC sought to satisfy its judgment against Vesco out of assets of the Company. The Company's appeal to the Second Circuit of the denial of the intervention motion was denied, based, at least in part, upon the trial court's assurance that the Company would have its opportunity to be heard.

3. The District Court Proceedings

On May 20, 1975, ICC secured an order to show cause in seeking to enforce both of its default judgments against Vesco by securing assets of the Company. The Company responded by seeking a hearing on the underlying claims against Vesco, both as to liability and damages, and otherwise challenging the appropriateness of executing upon the judgment at that time. The court, apparently reversing its prior stated position that the Company would have the opportunity to be heard on the merits of the judgment sought to be enforced, denied the Company's applications and ordered a hearing only on the issues of whether the Company was the alter ego of Vesco or whether fraudulent conveyances had been made.

The Company is a Delaware corporation formed in July 1972, as a result of estate planning begun in late 1967 or early 1968, by counsel for the Vesco family along with its accountants. The creation of the Company was occasioned by tax rulings received on or about April 26, 1972 and July 21, 1972.

In the months of July through December of 1972, Vesco exchanged 800,000 shares of ICC common stock owned by him (having a value of $2,500,000) to the Company in return for all of the preferred stock of the Company and a portion of the voting common stock. The preferred stock carried with it a liquidating preference equal to the same $2,500,000.

In addition, 46,380 shares of ICC common stock beneficially owned by the Vesco children since 1966, were exchanged

for a minority of the voting common stock and all of the non-voting common stock of the Company.

One of the purposes and effect of the transfer was to put an upper limit on the value of Vesco's ICC holdings, for estate tax purposes, at the par value of the preferred stock (i.e. the appraised fair market value of that stock at the date of the exchanges), thereby permitting all future appreciation of that stock to inure to the benefit of the non-voting common shareholders--the Vesco children--and to pass to them free of any estate tax.

The alter ego hearing was held on June 20, 1975. By memorandum decision dated August 22, 1975, the Court held that the Company was the alter ego of Robert L. Vesco and, therefore, that the assets of the Company were available to satisfy the judgments against Vesco as

an individual. The court thus never reached the alleged issue as to whether fraudulent conveyances had been effected. Orders were entered which had the effect of securing all ICC shares of stock now owned by the Company without regard to their prior ownership. Thus, stock beneficially owned by non-party third persons since approximately 1966, has been appropriated to satisfy the judgment against Vesco, although no one has even alleged, much less proved, any impropriety by anyone dating back to that period.

The Company duly filed and perfected an appeal to the Second Circuit. The Company argued on appeal that the court below had inconsistently granted plaintiff-respondent substantial rights to proceed as against the Company, while simultaneously denying the Company the

right to be heard thereon. In short, in the view of the trial court, the Company is not Vesco for purposes of appealing the lack of procedural and substantive due process, from service through judgment, and has not ever been permitted to be heard on the merits; however, it is Vesco for purposes of execution and collection.

The Company's appeal, filed on September 19, 1975, resulted in a decision by the Second Circuit Court of Appeals, dated May 13, 1976, by which the default judgment entered against Vesco, which formed the basis of the proceedings against the Company, was determined to lack the requisite elements of "finality." The Court of Appeals found it unnecessary to pass upon the remaining substantial issues, and remanded the matter to the District Court for clarification and the entry of

a "new judgment". Although remanding for further proceedings on this underlying issue of the finality of the default judgment, the Court of Appeals did not expressly retain jurisdiction of the further consequential matters in dispute.

On May 21, 1976, ICC obtained an order to show cause from the District Court as to why a new amended judgment should not be entered nunc pro tunc as of July 12, 1974. On the return date of the order to show cause, May 26, 1976, the Company appeared to argue in vain its opposition to the entry of such a nunc pro tunc judgment. The court heard only brief argument and gave no substantial reasons for the extraordinary retrospective nature of the judgment entered. Thus a new "final judgment" was entered against Robert L. Vesco,

purportedly effective as of almost two years earlier.

4. The orders of the Court of Appeals

Considerable confusion followed signing of the new amended judgment on May 26, 1976. On June 16, 1976, the Company's counsel received a copy of a letter from the attorneys for ICC addressed to the Clerk of the United States Court of Appeals for the Second Circuit, requesting guidance as to the status of the Company's original appeal. Counsel inquired:

> "Please advise whether the Court of Appeals is now in a position to proceed to determine the issues on the appeal or whether any further action is required to complete the record."

Upon receipt of this letter, the Company's attorneys also wrote to the Clerk expressing their own uncertainty "as to the appropriate procedure for bringing

before the Court the still unresolved issues". The Company's counsel suggested that the court set a reasonable timetable for amendment and completion of the record and for submission of supplemental memoranda of law with respect to Judge Stewart's "recent action."

The Company first learned that the amended judgment had been entered, when it received the Clerk's response on June 24, 1976, advising that the earlier appeal was no longer before the appellate court, and that:

> "[s]hould any further proceedings in the ... litigation come before the court, the parties may, if so advised request the court to consider the matter on the briefs and appendix previously filed in that appeal, with whatever supplemental briefs they may desire to submit".

The last sentence pointed out that "the court cannot, of course, give any advisory opinion on the effect of the District Court's judgment entered May 27, 1976, ordered entered nunc pro tunc as of July 12, 1974."

Thus, learning in late June that the amended judgment had been docketed, and being in a quandry (as were the attorneys for ICC) as to the proper avenue for further proceedings, counsel for petitioner filed its notice of appeal on July 7, 1976, nine days out of time.

On August 4, 1976, almost a full month later, the Company was served with ICC's notice of motion to dismiss on the ground that the "Notice of Appeal was not timely filed and that no order has been entered extending the time for the filing of said Notice of Appeal."

The Company, on August 31, 1976, filed a notice of cross-motion for reacceptance of jurisdiction of the issues presented before the Second Circuit on the earlier appeal. By orders dated September 14, 1976, the Second Circuit granted ICC's motion to dismiss, and denied petitioner's cross-motion for reacceptance of jurisdiction.

The Company then moved the District Court to vacate the May 26 judgment, pursuant to Fed. R. Civ. P. 60(b) contending, inter alia, that equitable considerations required entry of an order from which an appeal could be taken. That motion was consolidated with another motion by the Company for an extension of time within which to file an appeal, pursuant to Fed. R. App. P. 4(a). Both motions were denied by the District Court in an order and opinion dated November 1, 1976.

The Company appealed to the Second Circuit only from that portion of the District Court's order denying its motion for relief pursuant to Rule 60(b). The Court of Appeals affirmed in an opinion Dated June 3, 1977. Thus, in the absence of the issuance of a writ of certiorari, substantial assets of the Petitioner will be forfeited, based solely upon a default judgment against its shareholder, Vesco, without its being able to interpose any defense on the merits of ICC's claims.

Reasons for Granting The Writ

The decision of the Court of Appeals offends due process of law by subjecting petitioner to a large judgment without allowing an argument on the merits. The decision is an abuse of the Federal Rules of Civil Procedure which were

drafted inter alia to avoid aberrations such as this litigation which has proceeded torturously through the courts since 1973 without a decision on the merits of the case. The case improperly expands the jurisdiction of the federal courts to actions which represent, in the worst light to defendant Vesco, a waste of plaintiff's assets resulting from a complicated scheme of common law fraud and, in the best light to Vesco, a breach of contract to reimburse ICC for expenses incurred pursuant to a contract providing for such reimbursement.

POINT I

THE COMPANY WAS DENIED DUE PROCESS AS A RESULT OF THE DENIAL BY THE DISTRICT COURT OF THE COMPANY'S MOTION TO PERMIT IT TO FILE A TIMELY APPEAL FROM THE AMENDED FINAL JUDGMENT.

Rule 60(b)(6) of the Federal Rules of Civil Procedure (hereinafter "Civil Rules") authorizes the federal courts to relieve a party from a final judgment for "any . . . reason justifying relief from the operation of the judgment". This section "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice". Klapprott v. United States 335 U.S. 601, 615 (1949). The rule is most liberally applied to relieve parties of default judgments and in other instances where the merits of a claim for relief or defense have never been heard in the courts below. Flaksa v. Little River Marine Construction Co. 389 F.2d 885

(6th Cir. 1968) cert. denied 392 U.S. 928 (1968); Schwab v. Bullock's Inc., 508 F.2d 353 (9th Cir. 1974). Cf. 11 Wright & Miller, Federal Practice and Procedure (1970) (hereinafter "Wright & Miller") §2864 and 7 Moore's. Federal Practice (2d. ed. 1975) (hereinafter "Moore's") ¶60.19 n.12.[1]

On the strength of Civil Rule 60(b), the court in Fidelity & Dep. Co. of Md. v. USAFORM Hail Pool, Inc., 523 F.2d 744 (5th Cir. 1974) cert. denied 425 U.S. 950 (1976) vacated and then reentered a final judgment in order to permit appellant to take an appeal therefrom, where notice of appeal from the original judgment had been untimely

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1. Certiorari is appropriate to pass on questions of importance in administration of the Civil Rules. Cf. La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

filed. In commenting on the effect of Civil Rule 77(d) in that case, the court noted:

> "The potential hardship to parties whose counsel, through inadvertence or lack of due diligence, failed to learn of the entry of judgments is apparent. Less apparent is whether the benefit of enhanced finality outweighs these cases of hardship, and the burden on all concerned with respect to the periodic inquiries the amended rule implicity contemplates." id at p. 749.

The grounds cited in the Fidelity case as compelling the exercise of judicial discretion to permit an appeal, though untimely filed, were: (i) excusable neglect because of error of the court or understandable misunderstandings of attorneys, (ii) lengthy and complicated proceedings below involving substantial sums where appeal by either side was a virtual certainty, and (iii) where there was lack of prejudice to one party and substantial prejudice to the opposing party.

Similarly, in Smith v. Jackson Tool & Die, Inc. 426 F.2d 5 (5th Cir. 1970) the District Court had circulated its opinion to the parties before entering judgment. Counsel for appellant requested the court to delay entering final judgment. Opposing counsel did not object. An appeal from the judgment was a certainty. The court, however, never responded to the request for a delay of entry of the judgment and proceeded to enter judgment thirteen days after circulating the opinion. Counsel for appellant learned of the entry of judgment only after the time for filing notice of appeal had expired. The courts granted relief from the error because of the obvious confusion caused, at least in part, by the court's lack of response to counsel's request. Accord, Expeditions Unlimited Acquatic Enterprises Inc. v. Smithsonian Institute, 500 F.2d 808 (D.C. Cir. 1974)

The instant case presents a more compelling case for the exercise of the court's discretion under Civil Rule 60(b) because petitioner's repeated requests to be heard on the merits of the litigation and to raise substantial questions of due process and lack of jurisdiction have been rebuffed by the courts below.

The issues sought to be raised by the Company were properly before the Court of Appeals in the first instance International Controls Corp. v. Vesco, 535 F.2d 742 (2d Cir. 1976) cert. denied 45 U.S.L.W. 3563 (Feb. 22, 1977) but have never been reviewed because of the determination that the judgment entered by the District Court lacked the necessary certification of finality under Civil Rule 54(b). For this reason, the remaining issues were not at

that time considered. However, despite the fact that the Court of Appeals was apparently merely remanding for "clarification", there was no indication of retention of jurisdiction.

The District Court, in summary fashion, without allowing any further discussion by counsel, signed an amended final judgment on May 26, 1976 nunc pro tunc to July 12, 1974. Considerable confusion followed signing of the amended judgment because it did not refer to the Company and no indication was given that the Company had the same rights of appeal as it had from the memorandum decision on August 22, 1975 declaring the Company to be the alter-ego of Vesco.

The Company first learned that the amended judgment had been entered,[2] when it received the Clerk's response to its and ICC's correspondence on June 24, 1976, advising that the earlier appeal was no longer before the appellate court. Thus, being in a quandry (as were the attorneys for plaintiff) as to the proper avenue for further proceedings, prior counsel for petitioner herein filed its notice of appeal on July 7, 1976.[3]

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2. Although the court docket apparently contains a notation that notice was sent of the filing of the amended judgment, petitioner's prior counsel indicated that it did not receive a copy of the same. A copy may not have been mailed to petitioner because the judgment was not against petitioner, although it was clearly an interested party that had entered an appearance.

3. The correspondence of counsel and the Clerk of the United States Court of Appeals, Second Circuit, appears in app. 76-7580: 188a to 192a.

The Supreme Court has inherent power to recall or amend judgments so as to remand the cause for a determination of questions left undecided. Gondeck v. Pan American World Airways, 382 U.S. 25 (1965); United States v. Ohio Power Co., 353 U.S. 98 (1957).

The instant situation is substantially similar to Cahill v. New York N.H. & H.R. Co., 351 U.S. 183 (1956), where interests of fairness compelled this Court to recall a District Court judgment, so as to remand the cause to the Court of Appeals for determination of a question left undecided on a prior appeal.

The defendant railroad appealed to the Court of Appeals in the Cahill case from a judgment of the District Court in favor of the plaintiff in an action

under the Federal Employees' Liability Act, on two grounds: (i) there was insufficient evidence to permit the submission of the case to the jury; (ii) the trial judge erroneously admitted evidence of prior accidents at the scene of plaintiff's injury. The Court of Appeals reversed on the ground that there was insufficient evidence to support the verdict. The judgment of the Court of Appeals was reversed by the United States Supreme Court and the railroad's petition for a rehearing was denied. After a certified copy of the judgment was sent to the District Court, that court denied an application for a stay of execution, and the judgment was satisfied. The defendant then filed in the Supreme Court a motion to recall and amend the judgment, so as to remand the cause to the Court of Appeals for a

determination of the question left undecided on the original appeal, to wit, whether the trial judge erred in admitting evidence of prior accidents.

The defendant's motion to recall was granted on the grounds that the original order of the Supreme Court was erroneous and the recall was in the interest of fairness. Moreover, Supreme Court Rule 58(4), which bars consecutive and out-of-time petitions for rehearing, was held not to prohibit the motion, to correct the error there involved. See also: Boudoin v. Lykes Bros. S.S. Co., 350 U.S. 811, (1954).

Petitioner submits that the factual situation herein presents equities even more compelling than the situation described in Cahill.

POINT II

THE RIGHT OF VESCO & CO., INC. TO BE HEARD ON THE MERITS OF THE CLAIMS AGAINST ROBERT L. VESCO.

The courts below have treated the Company as the defendant for purposes of execution of a judgment but have refused the Company the right to defend on the merits without citing any support for this anomolous conclusion. From the first motions argued by the parties herein, ICC has made it clear that it intended to seek satisfaction of any judgment it obtaind against Vesco out of the assets of the Company. The Company properly filed an answer and throughout these proceedings had taken the position that it should be heard on the merits of the underlying claims and on the propriety of the procedural determinations which, in the final analysis, were to

be charged against the Company. Although, the District Court (Stewart, J.) indicated on several occasions that basic notions of fairness would seemingly dictate that the Company be heard on the merits, at every turn this opportunity has been effectively foreclosed. This has resulted in the Company being subject to execution on a final judgment in this proceeding of $2,422,466.72 and additional judgments in a companion proceeding (74 Civ. 1588) of $2,900,000,00 without being able to submit a defense on the merits.

In the instant action, the Company submitted memoranda both before and after the inquest to determine damages arguing that ICC's allegations that the Company was merely the alter-ego of Vesco entitled the Company to defend on the merits and to cross-examine ICC's witnesses regarding

damages (app. 75-7548-710a-722a). The District Court issued no orders denying the Company's request. Nonetheless, the courts below have entered judgement against the Company, based upon prior judgments by default entered against Vesco, without permitting the Company the opportunity to challenge the procedural or substantive propriety of such underlying judgments. The Company's right to effectively participate in this proceeding was limited by the courts below to the hearing to determine whether or not the Company was the alter-ego of Vesco. Yet on July 12, 1974, when this matter was before the court below, upon partial inquest, prior counsel for the Company requested a hearing on the merits, and the following dialogue ensued:

"MR. ORLOFF: Your Honor, I should have an opportunity to put some evidence before the Court also, and I would most respectfully say that I should have the opportunity to put forth evidence, not only as to the dollar figure of any damage award, but also as to the liability issue.

"I realize that the plaintiff has taken a contrary position in its memorandum, but, as we suggested to your Honor in our memorandum, both from the standpoint of Vesco & Co.'s potential vulnerability for any judgment against Robert Vesco, and by virtue of the fact that there has been a conspiracy alleged among a number of defendants, who have not had a chance to defend themselves as yet, on this issue, no judgment should be entered until that defense is put in.

THE COURT: I have these thoughts about it: It seems to me that in terms of the dollars, Mr. Carroll has told us what they are, and my notion is that this is reasonably clear.

"On the other hand, what you say about the merits concerns me. I think I am obligated to give you a hearing on the question of conspiracy and on the merits. I'd like to do it promptly. What's your notion on it?

"MR. ORLOFF: Within some reasonable time period, your Honor. I don't mean months, but I am talking certainly about weeks. I would be ready on that (App. 75-7548: 779a to 780a). And later at that same hearing:

"MR. ORLOFF: I was going to ask of Mr. Carroll through the Court whether I am therefore assured, and I

guess I must respectfully ask the Court, too, that if a judgment were to be entered against Robert L. Vesco alone, would Vesco & Co. have an opportunity at a later date to be heard fully on the merits?

"THE COURT" I have just been told by Mr. Carroll he doesn't want a judgment against Vesco & Co., Inc.

"MR. ORLOFF: I think he is going to come in for one later on, and I want to make sure I will get my full hearing.

"THE COURT: Of course you will." (App. 75-7548: 789a to 790a).

It is submitted that the error of the courts below resulted from the misapplication of the common law doctrine of disregarding or "piercing" the corporate "veil" to the instant situation.

The theory of "piercing the corporate veil" because the corporation is the alter-ego of its principals is applied to fasten liability on an individual (or parent corporation) who uses the corporate entity as a mere instrumentality to conduct his affairs and where fraud or injustice would result because third parties dealing with the corporation are effectively left without a remedy if the corporation's existence were to be upheld. Quarles v. Fuqua Industries, Inc. 504 F.2d 1358 (1974). See generally, Fletcher, Cyclopedia of Corporations (1974 Rev. Volume) (hereinafter "Fletcher") §41.1. In the overwhelming majority of cases which deal with the "alter-ego" question, the corporation is so undercapitalized as to be unable to meet the valid claims of creditors. See Hudson v. Wylie, 242

F.2d 435 (9th Cir. 1957) cert. denied 355 U.S. 828 (1957). The constitutional rights of a corporate shell can hardly be said to be of concern either to litigants or the courts. The dearth of precedents therefore can hardly be surprising. Here, however, the situation is quite the reverse. The Company has substantial assets, only a portion of which were contributed by Vesco, and has in vain sought to be heard to protect its property.

The case is not unlike Olympic Capital Corporation v. Newman 276 F.Supp. 646 (C.D. Calif. 1967).

In that case, plaintiffs sought to obtain jurisdiction over its debtor on a note by attaching a debt due to the debtor's wholly-owned small business investment company. Plaintiff had no other basis for placing jurisdiction and venue

in the Central District of California. Since the corporate defendant did not in any direct capacity participate in the issuance of the note, plaintiffs alleged that the corporation was the mere alter-ego of the individual defendant. In rejecting plaintiff's theory the court indicated:

> "Alter ego would appear to be limited to the situation where there is reason to disregard a corporate entity to reach individuals, it has no applicability in disregarding the existence of an individual to reach corporate assets." (p. 655)

> "Although not argued by plaintiff it can be assumed that by its position it would claim that the alter ego theory asserted in plaintiff's complaint makes the property of the defendant corporation the property of defendant NEWMAN. This would be a complete distortion of the alter ego doctrine. That doctrine has been invoked when fairness and justice require that the property of individual stockholders be made subject to debts of the corporation. To apply such a doctrine here would be asking the court to apply the doctrine in one manner, i.e.,

> make the property of the corporation the property of a stockholder, for the purposes of obtaining jurisdiction of the person of the stockholder and then to reverse the procedure, i.e., make the action of the individual stockholder the action of the corporation for purposes of creating liability in the name of the corporation. Neither reason nor law compel such a gymnastic." (P.658)

The Company is in the position of a bona fide purchaser for value[4] of property sought by the creditors of its vendor, and as such, should have the right to defend

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4. The Company issued its preferred stock having a liquidation preference of $2,500,000 (the market value of 800,000 shares of I.C.C. common stock transferred to it by Vesco) and a portion of the voting common stock of the Company. No showing has ever been made that I.C.C. would be damaged if its recovery were limited to Vesco's stock in the Company. I.C.C. argued below that the conveyance of ICC stock to the Company by Vesco was fraudulent but the Court dated Agusut 22, 1975, App. 75-7548: 1077a to 1087a. Irrespective of the merits of ICC's argument, the Company should not have been precluded from submitted a defense on the merits of ICC's claims for relief.

either because it has a superior claim to the property or because no claim for relief has been properly made against its vendor. It is the undisputed general rule that a grantee of a conveyance which is alleged as fraudulent is entitled to set up defenses that his grantor may have invoked as personal defenses. 37 Corpus Juris Secundum §349a (hereinafter "C.J.S."). Fidelity & Casualty Co. of New York v. Bank of Plymouth 218 Iowa 1083, 255 N.W. 713 (1934). Chapline v. North American Acceptance Corp. 25 Ariz. App. 465, 544 P.2d 682 (1976). The only exception to such rule is when the creditor can successfully establish that the grantee is collaterally estopped from interposing a defense based upon a prior

judgment in an independent action. Dillion Tire Service Inc. v. R. H. Pope 243 S.C. 293, 133 S.E. 2d 813 (1963).

The case of United States v. Borchardt, 470 F.2d 257 (7th Cir. 1972) involved the attempted foreclosure of a tax lien by the government on property transferred to Borchardt by Mrs. Mensik. Subsequent to the transfer, Mr. Mensik, who had no interest in the property, signed a waiver on behalf of himsel and his wife extending the applicable statute of limitations. Mr. and Mrs. Mensik defaulted on the tax claim and the I.R.S. moved for summary mudgment in the instant action claiming that Borchardt could not assert any defenses otherwise available to Mrs. Mensik because of the default. The court rejected the government's position, declaring:

> "although a default may serve as the basis for a default judgment [Rule 55(b), Fed. R. Civ.P.], the entry does not of itself determined rights. Moreover, even if Mary Mensik had suffered a default judgment before the Government moved for summary judgment against appellants, they would not have been barred from proceeding with their own defense to the foreclosure action." (p.260).
>
> See also, Harris v. Carter 33 N.C. App. 179, 234 S.E. 2d 472 (1977).

The application of the incorrect legal theory in the case below, in addition to barring the Company's presentation of a defense, resulted in the seizure of 46,380 shares of ICC common stock contributed to the Company by Vesco's children. Such shares had been beneficially owned by the Vesco children since 1966, many years prior to

the period in which the causes of action against Vesco were alleged to accrue.

Such contribution was outlined in the court below, as follows:

> "Prior to December 19, 1966, Robert L. Vesco was custodian for each of his four children for 100 shares each of the stock of Captive Seal Corporation represented by Certificates No. C-39 through C-42. On December 19, 1966, Captive Seal Corporation merged into ICC of New Jersey and the children became the beneficial owners of 773 shares each of that corporation's common stock represented by Certificate No. 72 through 75. Also, on December 19, 1966, ICC of New Jersey merged into ICC of Florida which was formerly known as Cyrogenics, Inc. Each of the Vesco children became a beneficial owner of the 11,595 shares of that corporation's common stock. (App. 75-7548: 1076a).

No evidence whatever was submitted to indicate or even suggest that these shares

were fraudulently conveyed to the children; yet the court below ordered that all of the Company's securities, including the children's shares, be seized to satisfy ICC's judgment against Vesco. By doing so, ICC is placed in a better position than it would have occupied had the Company never been formed. A creditor may not be placed in a better economic position after a successful attack of a conveyance as fraudulent, than he would have been in had the conveyance not been made. Empire Lighting Fixture Co. v. Practical Lighting Fixture Co., 20 F.2d 295 (2d Cir. 1927); Feldman v. Chase Manhattan Bank, N.A., 368 F.Supp. 1327 (S.D.N.Y. 1974), rev'd on other grounds, 511 F.2d 478 (2d Cir. 1975).

The Supreme Court has consistently held that the central meaning of due process is that "[p]arties whose rights are to be affected are entitled to be heard. . . ." Baldwin v. Hale, 68 U.S. 223, 233, (1863) Cf. Hovey v. Elliot, 167 U.S. 409 (1897). It is equally fundamental that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Thus, this Court has held that the mere right to be heard after a replevin of property purchased pursuant to a conditional sales contract was constitutionally insufficient. Fuentes v. Shevin, 407 U.S. 67 (1972). It is submitted that the denial of petitioner's rights to be heard on the

merits is similiarly deficient and its participation in the "alter ego" proceeding did not cure the violation of its Fifth Amendment rights.

POINT III

THE ISSUES RAISED, BUT UNDETERMINED IN THE COURTS BELOW ESTABLISH THAT PETITIONER HAS SUBSTANTIAL MERITORIOUS DEFENSES

1. Subject Matter Jurisdiction and Failure to State a Claim Cognizable by the Federal Courts

There is a need for the Supreme Court to address the issue of whether a plaintiff, after securing a default judgment for violation of Rule 10(b)(5), must establish a nexus between its damages and the purchase and sale of a security. Blue Chip Stamps v. Manor Drug Stores 421 U.S. 723 (1975); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1951) cert. den. 343 U.S. 956 (1952).

Defendant Vesco, by his default, has admitted the truth of well pleaded allegations of fact. Thomson v. Wooster 114

U.S. 104 (1885). Whether or not such default should bar petitioner herein, nothing in Thompson or in any later case supports the propositions that (i) a default admits legal conclusions or (ii) the facts alleged constitute a cause of action or (iii) recovery of damages is authorized. Cragin v. Lovell, 109 U.S. 194, 199 (1883); Ohio Central R.R. Co. v. Central Trust Co. 133 U.S. 83 (1890); Nishimatsu Construction Co. Ltd. v. Houston National Bank, 515 F.2d 1200 (5th Cir. 1975). Even after a default, it remains for the court to consider whether the "unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment." Pope v. United States 323 U.S. 1, 12 (1944).

The lack of subject matter jurisdiction may be raised at any time by the parties or on the court's own motion. Civil Rule 12(h)(3), Louisville & Nashville Ry. Co. v. Mottley 211 U.S. 149 (1808); Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir. 1967) cert. den. 389 U.S. 970 (1967).

Today's more relaxed notions of pleading allow the use of conclusions in a complaint, but it is nonetheless true that conclusory allegations do not necessarily constitute a valid claim for relief. SCM Corp. v. Radio Corporation of America, 407 F.2d 166 (2 Cir. 1968) cert. den. 395 U.S. 943 (1969); Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, (1974). reh. den. 410 U.S. 975 (]973). Irrespective of a default judgment, the courts must be satisfied that the judgment is just and

and the court has discretion to require proof of some or all of the facts going to liability. Civil Rule 55(b)(2). Jackson v. Kotzebue Oil Sales, 17 F.R.D. 204 (D. Alaska 1955); Norman v. Young, 422 F.2d 470 (10th Cir. 1970).

Even if a court fails to exercise its discretion to call for proof of liability, it must take into account, in entering judgment, facts that have become part of the record. 6 Moore ¶55.06, Frow v. De La Vega, 15 Wall (82 U.S.) 552 (1872). After default or other admission of liability, plaintiff is nonetheless required to establish with reasonable probability the existence of some causal connection between defendant's wrongful acts and plaintiff's loss. E.V. Prentice

Machinery Co. v.Assoc. Plywood Mills, 252 F.2d 473 (9th Cir. 1958), cert. den. 356 U.S. 951 (1958), Civil Rule 8(d).

At the damage hearing, ICC for the first time specified the conduct of defendants that it claimed had injured it and for which it sought damages. On a complaint that alleged fraud in connection with the purchase and sale of securities, the only evidence submitted by ICC involved the wrongful purchase and use of an airplane for purposes which benefited only Vesco, a classic allegation of misuse of corporate assets cognizable under state law. The evidence submitted by ICC was based exclusively on the

testimony of Robert S. Ost, controller of ICC, which is extensively summarized in Mr. Ost's post-hearing affidavit (app. 76-7580-149a to 179a). Such evidence is limited to a discussion of charges incurred for the purchase and use of a Boeing 707 airplane which should have been reimbursed to ICC by I.O.S. Ltd. and/or Vesco pursuant to a contract which provided for such reimbursement and pursuant to which there was partial reimbursement.

Although the affidavit in paragraph 4 declares that the stock of Fairfield was distributed to the stockholders of ICC in February 1972, no damages are attributable to such actions nor is an attempt made to connect such corporate recapitalization to the damages alleged from wrongful purchase or use of the plane. In fact, if the

purchase and operation of the plane was a misappropriation of ICC's assets, it would have been so whether or not the plane was owned directly by ICC or a subsidiary either before or after the distribution of the stock of such subsidiary to ICC's stockholders.

In the securities laws, Congress "did not seek to regulate transactions which constitute no more than internal corporate mismangement." Supt. of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971). Because the testimoney adduced at the hearing to determine damages establishes only liability for improper acquisition and use of an airplane to the detriment of plaintiff, the posture of the case at this juncture fails to establish a cause of action cognizable with Rule 10(b)(5). A dividend of Fairfield General to ICC

shareholders was in the nature of a recapitalization of ICC and no allegation was made or evidence submitted that shareholders of ICC were not in the same position after the dividend as before. Re Penn Central Securities Litigation 357 F. Supp. 869 (E.D. Pa. 1973), aff'd. 494 F.2d 528 (5th Cir. 1974). See also Lawrence v. Securities and Exchange Commission, 398 F.2d 276 (1st Cir. 1968). The federal courts have not hesitated to reject claims for relief, though made to appear as securities law violations, when they were nothing more than "garden variety" common law actions. Shemtob v. Shearson, Hammil & Co., 448 F.2d 442 (2d Cir. 1971).

2. In Personam Jurisdiction and the Effect of the Amended Complaint

The Court of Appeals below (App. 1a)

acknowledged that had the amended complaint of September 1973 been properly served on Vesco, it would have superseded the original complaint and rendered it of no legal effect. [App. 6a] p. 3994. See e.g., Washer v. Bullit County, 110 U.S. 558, 562 (1884); Miller v. American Export Lines, Inc., 313 F.2d 218 (2d Cir. 1963); Cicchetti v. Lucey 514 F.2d 362, 365 n.5 (1st Cir. 1975). The Court of Appeals, however, affirmed, without reviewing the District Court's finding that the amended complaint was not properly served on Vesco. The District Court held that the method of service of process of the amended complaint outlined by the process server did not comply with the Court's order because the process server was not able to "leave" the papers at Vesco's purported residence in the

Bahamas. But the court also noted:

> "In light of representations recently made to this Court by counsel for plaintiff as to what information was av ilable about Vesco's whereabouts in October of 1973, the terms of this order may not comport with the requirements of due process. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Milliken v. Meyer, 311 U.S. 457 (1940)." (App. 76-7580: 214a).

The court was apparently referring to an affidavit of the court-appointed special counsel for ICC, dated June 18, 1973 which characterized Vesco as a "fugitive from justice residing in Costa Rica" (App. 75-7548, p. 321a). However, service of process of the original complaint was also served at the purported residence of Vesco in the Bahamas on July 30, 1973. The affidavit of the process server of the original complaint appears at App. 76-7580: 55a-60a and the affidavit of the

process server of the amended complaint appears at App. 76-7580: 100a to 110a. The inescapable conclusion is that either both attempts to serve process on Vesco did not comport with Civil Rule 4(i) and constitutional notions of due process or both attempts were successful in which event the amended complaint superseded the original complaint. See generally, 3 Moores ¶15.08[7].

3. Absence of Fraud and Misappropriation of Corporate Assets

During the course of the inquest to determine ICC's damages, Robert Ost, controller of ICC, admitted that approximately $2,400,000 of airplane related expenses were incurred in 1972 and 1973 by ICC of which approximately $650,000 was reimbursed (App. 76-7580: 151a). He

further admitted that I.O.S. Ltd. had reimbursed ICC for a portion of the airplane expenses (App. 75-7548: 772a). It is submitted that if the Company were allowed to interpose a defense on the merits, evidence could be adduced at trial that ICC's claim for relief is limited to a claim against Skyways, its former subsidiary, and IOS Ltd. for breach of contract for failure to reimburse it for expenses incurred pursuant to agreements providing for such reimbursement.

4. Vesco & Co. as the Alter Ego of Vesco

The finding that the Company was the alter ego of Vesco was against the weight of the evidence and denial of the company's right to appeal therefrom

would deprive it of property without due process of law. The power to disregard the entity of a corporation is only to be exercised under exceptional circumstances when it has been established by a great preponderance of the evidence that the corporation was the mere instrumentality of its principals and that its formation and operation was a subterfuge to promote injustice and protect fraud. Zubick v. Zubick, 384 F.2d 267 (3d Cir. 1967) cert. den. 390 U.S. 988 (1968); Hudson v. Wylie, supra. In Re Charles K. Horton, 22 F.Supp 905 (S.D. Texas 1938); see generally, Fletcher Op cit. §41.2 (1963).

But perhaps most important to the instant case are the frequent judicial statements that a mere showing that the corporate form is adopted in good faith to facilitate a particular business

purpose, will justify the non-application of the alter ego doctrine. See e.g. Majestic Co. v. Orpheum Circuit, 21 F.2d 720 (8th Cir. 1927).

A careful review of the June 30, 1975 transcript of proceedings before Judge Stewart of the District Court (App. 75-7548: 900a to 1042a) reveals that ICC fell far short of carrying its heavy burden of proof. Accordingly, the Memorandum decision of Judge Stewart (App 75-7548; 1077a to 1087a) should be reversed.

ICC did not refute the testimony of the Company's accountant, Alan Bloom, that the conceptualization, of the Company as an estate planning device took place in early 1967. The purpose of the formation of the corporation was to freeze the value of Vesco's ICC

stockholdings at the time of transfer, and provide that any future appreciation would inure to the benefit of the Vesco children, and pass to them free of any estate tax. The actual formation of the Company on July 12, 1972 and the transfer by Vesco of ICC stock from July to December 1972 was within a reasonable time after receipt of favorable IRS rulings on April 26, 1972 and July 21, 1972, necessary for the transfer.

Despite lengthy testimony by Mr. Bloom, which explained the hiatus between the idea for the Company and its implementation in terms of the rise and fall of ICC's stock value, ICC convinced the Court that Vesco, in 1972, certain that the Securities and Exchange Commission was about to descend upon him, secreted all of his assets in the

Company. No evidence was ever submitted to establish that the stock received by Vesco in the company had a substantially different value from the ICC stock exchanged therefor which would prevent ICC from satisfying its default judgment against Vesco.

Furthermore, Harry Sears, ICC's witness testified that the early part of the SEC investigation centered around ICC itself rather than Vesco. And Bloom testified that the plan was reactivated in 1971, prior to the period covered by Sears' testimony. Exhibits submitted, particularly the first Internal Revenue ruling request, clearly antedate the time about which Sears was called to testify, and thus clearly undercut ICC's attempt to prove that the creation of the Company was not motivated by legitimate tax considerations.

ICC produced as witnesses Elmer Sticco and Leonard Polisar, both of whom testified that in late 1972, or early 1973, Robert L. Vesco entered into negotiations with third parties purportedly on behalf of the Company. But why should he not negotiate for the Company? He was a stockholder and an officer. Obviously, such representation of a corporate entity cannot be evidence that the corporation is a sham unless there was evidence which established that Vesco treated the Company as his instrumentaility for purely personal business. Although ICC introduced evidence of a guarantee by the Company of a loan for Vesco, minutes confirming such negotiations and the consideration received for such guarantee by the Company from Vesco was acknowledged as

satisfactory by the Company's Board of Directors.

ICC, in its arguments before the court below, emphasized the close personal relationship between Vesco and the other officers and directors of the Company, a fact which the Company did not dispute. Virtually every closely held corporation enjoys close personal relationships among its principals. But such fact could scarcely militate against a valid corporate entity, existing for a valid purpose. Nevertheless, the District Court's opinion imputes a "sinister" quality to such organization.

With 20-20 hindsight, ICC and the court look back upon what has transpired since 1973 to prove a fraud in 1972. But Robert Vesco was not a "fugitive from justice" in April (when the first IRS rulings were received) or July,

1972; nor had the SEC even commenced its action against him. The Company respectfully submits that ICC totally failed to overcome the presumption of validity to which every corporation is entitled. It waged a campaign of innuendo and insinuation based both upon such hindsight and upon the notoriety of Vesco. The District Court's finding upon such skimpy evidence, and in the face of all the Company's testimony to the contrary should be reversed.

Equally important, the District Court, in effect, ordered a forfeiture of all assets of the Company, despite the fact that other persons have substantial beneficial interests in the Company. These persons were never made parties to this proceeding and, thus, even if ICC were to be permitted to pursue

assets of the Company transferred by Robert L. Vesco, there exists no basis of any kind upon which the assets of other persons could be similarly forfeited. This flagrant abuse of justice, to the detriment of non-party third persons, remains unremedied and constitutes perhaps the most palpably unjust result of the proceedings below.

CONCLUSION

Petitioner concludes that it has been unfairly denied the right to interpose a defense on the merits of respondent's claim for relief which is a denial of its rights to due process. Furthermore, the posture of this case at this juncture fails to support the jurisdiction of the federal courts. For the reasons stated, this writ should be granted and the judgment of the Court of

Appeals for the Second Circuit reversed.

Dated: New York, New York
October 20, 1977

Respectfully submitted,

Law offices of
Robert D. Foglia
600 Third Avenue
New York, New York
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 811—September Term, 1976.

(Argued April 6, 1977 Decided June 3, 1977.)

Docket No. 76-7580

INTERNATIONAL CONTROLS CORP.,

Plaintiff-Appellee,

v.

ROBERT L. VESCO, et al.,

Defendants,

and

VESCO & CO., INC.,

Defendant-Appellant.

Before:

OAKES, *Circuit Judge,* and
WYZANSKI* and HOLDEN,** *District Judges.*

Appeal from order of the United States District Court for the Southern District of New York, Charles E. Stew-

* Senior Judge of the United States District Court for the District of Massachusetts, sitting by designation.

** Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

art, Jr., *Judge*, denying motion to vacate judgment under Fed. R. Civ. P. 60(b).

Affirmed.

ALBERT G. BESSER, Newark, N.J. (Arum, Friedman & Katz, New York, N.Y., Hannoch, Weisman, Stern & Besser, Newark, N.J., Robert C. Epstein, of counsel), *for Defendant-Appellant*..

MILTON S. GOULD, New York, N.Y. (Sheldon D. Camhy Daniel L. Carroll, Dean G. Yuzek, Shea Gould Climenko & Casey, New York, N.Y., of counsel), *for Plaintiff-Appellee.*

OAKES, *Circuit Judge*:

The litigation between International Controls Corp. (ICC) and Robert L. Vesco has been before this court on several prior occasions, two of which resulted in published opinions, *ICC* v. *Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974); *ICC* v. *Vesco*, 535 F.2d 742 (2d Cir. 1976). In the earlier of these, Chief Judge Kaufman wrote of "the multifarious financial manipulations of Robert Vesco" and referred to "a web of corporate and personal transactions of astonishing intricacy." 490 F.2d at 1333. While those transactions are not before us in the instant appeal, it was Mr. Vesco's "multifarious manipulations" that led him to absent himself from this country and to be unavailable for service of process. This persistent refusal to appear in any American court is the single most important contributing cause to the procedural problems that have culminated in this appeal, which is from an order denying a motion to vacate judgment entered in the United States District Court for the South-

ern District of New York, Charles E. Stewart, Jr., *Judge*. We affirm.

The underlying facts are set forth in the two earlier opinions of this court. It suffices here to state that ICC filed its initial complaint in June, 1973, and an amended complaint in September, 1973. In October, 1973, the district court entered a default judgment against Vesco, without any specification of damages; in July, 1974, a second default judgment, specifying some damages, was entered. ICC sought to satisfy these personal judgments against Vesco with assets of Vesco & Co. (the Company or appellant). The district court, in August, 1975, issued an execution order that pierced the corporate veil on the ground that the Company, wholly owned by Vesco and his children, is the alter ego of Vesco. An appeal from this order raised problems about the finality of the judgments on which it was based, and in May, 1976, this court remanded for clarification and the entry of a new judgment. The court did not reach the question of the validity of the alter ego ruling. 535 F.2d at 749.

It is the judgment on remand, issued by the district court in late May, 1976, that was the subject of the Company's motion to vacate below. Initially, the Company filed an appeal from that judgment nine days out of time, and this court accordingly dismissed the appeal as untimely. Alleging excusable neglect, the Company then moved in the district court for an extension of time within which to file the appeal, pursuant to Fed. R. App. P. 4(a). Judge Stewart denied the motion, and no appeal from that denial was taken. At about the same time, the Company moved for vacation of the judgment under Fed. R. Civ. P. 60(b),[1] appealing to the court's discretion and sense

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1 Fed. R. Civ. P. 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment,

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of justice[2] and alleging as well that the judgment was void because it was entered on the original complaint, which had been superseded and rendered *functus officio* by the amended complaint, and that the judgment was

order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

2 Appellant's notice of motion referred only to Fed. R. Civ. P. 60(b)(6), which confers broad discretion on the trial court to grant relief when "appropriate to accomplish justice," *Klapprott* v. *United States*, 335 U.S. 601, 615 (plurality opinion of Black, *J.*), *modified on other grounds*, 336 U.S. 942 (1949); *see* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2864, at 211-12 (1973). The notice did not refer to Rule 60(b)(4), which authorizes relief from void judgments, nor to Rule 60(b)(1), which authorizes relief on the ground of mistake. *See* note 1 *supra*. Thus appellee argues that the only issue before this court is whether the district court abused its discretion under Rule 60(b)(6). However, papers filed in support of appellant's motion plainly raised all of the grounds on which appellant based its claim that the judgment should be vacated. *See* Memorandum in Support of Motion by Vesco & Co., Inc., Pursuant to F.R.A.P. 4(a) to Enlarge Appeal Period or Alternatively Under F. R. Civ. P. 60(b) to Vacate and Reenter Order to Permit Timely Appeal at 4; Letters dated September 15, 1976, from Albert G. Besser to Hon. Charles E. Stewart, Jr. Since appellee thus had notice of the claims, these papers could be treated as the equivalent of a motion under all relevant subdivisions of Rule 60(b). *See* 7 *Moore's Federal Practice* ¶ 60.25[3], at 407 (2d ed. 1975); *cf. United States* v. *Wissahickon Tool Works, Inc.*, 200 F.2d 936, 938 (2d Cir. 1952) (untimely Rule 59 motion treated as Rule 60(b) motion); *United States* v. *Backofen*, 176 F.2d 263, 266 (3d Cir. 1949) (letter to district court treated as Rule 60(b) motion). In any event, the district court, which ruled on all issues raised on this appeal, had power to decide sua sponte whether its judgment should be vacated,

entered *nunc pro tunc* as of an erroneous date.[3] The district court rejected all of the Company's arguments and denied the motion. This appeal followed.

Reliance on the Original Complaint

The judgments issued by the district court in this case, all of which were incorporated by reference into the May, 1976, judgment challenged here, were based on ICC's original complaint, filed in June, 1973. Prior to any of the judgments, however, ICC filed an amended complaint in September, 1973. The district court found that the amended

provided all parties had notice, as they did here. *See United States* v. *Jacobs*, 298 F.2d 469, 472 (4th Cir. 1961); *United States* v. *Milano*, 148 F. Supp. 152, 154 (E.D. Mich. 1957); *cf. Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F.2d 798, 801 (2d Cir. 1960) (power of defrauded court to expunge judgment sua sponte). *See also Herzog & Straus* v. *GBT Corp.*, No. 76-7357, slip op. 2921, 2925 (2d Cir. Apr. 14, 1977) (power of court to grant summary judgment sua sponte after notice).

3 As a third reason for challenging the judgment, appellant argued below and contends here that the judgment was unclear and failed to conform to the original complaint on which it was based. The judgment, however, quite clearly refers "to the claims set forth in the Second Count of the Complaint and so much of the Third [through] Ninth and Eleventh Counts as relate to claims arising out of" a dividend in kind of the outstanding shares of Fairfield General Corp. declared by ICC in late 1970; a purchase by Skyways Leasing Corp. with ICC funds of a Boeing 707 in June, 1971; a lease between ICC and Skyways Leasing Corp. relating to the Boeing 707; and monies paid by ICC in connection with Vesco's use of the plane. Examination of the original complaint indicates that the second count deals with all four of the above matters. Each of the other counts referred to realleges and incorporates some or all of the paragraphs from the second count pertaining to these matters, with the distinct counts necessary because of different legal theories. We see nothing inconsistent or confusing about the judgment; quite wisely the court confined it to damages arising out of specific transactions, regardless of legal theories. We think Judge Stewart properly clarified his previous judgment in accordance with the mandate of this court in *ICC* v. *Vesco*, 535 F.2d 742 (2d Cir. 1976). It is immaterial that ICC is proceeding against certain other defendants on the amended complaint, since they have been properly served with that complaint.

complaint was not properly served on Vesco, a finding not challenged by appellant here. The amended complaint, moreover, had to be served on Vesco personally, despite his failure to appear, because it asserted "additional claims for relief." Fed. R. Civ. P. 5(a). These somewhat unusual facts leave us with an apparent question of first impression.

It is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect. *See, e.g., Washer* v. *Bullitt County*, 110 U.S. 558, 562 (1884); *Miller* v. *American Export Lines, Inc.*, 313 F.2d 218 (2d Cir. 1963) (per curiam); *Cicchetti* v. *Lucey*, 514 F.2d 362, 365 n.5 (1st Cir. 1975); 3 *Moore's Federal Practice* ¶ 15.08[7] (2d ed. 1974); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1476, at 389-90 (1971). Of the authorities stating this rule, however, none focuses on the point in time at which the superseding of the original by the amended complaint occurs.[4] Appellant argues that the critical point is the filing of the amended complaint, while appellee argues, and the court below held, that the original complaint is not superseded until the amended complaint is served. We agree with the court below, at least where, as here, the amended complaint is required to be served under Rule 5(a).

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4 Appellant cites two cases referring to the filing of the amended complaint as the critical point, but neither is of any assistance here. In *Phillips* v. *Murchison*, 194 F. Supp. 630 (S.D.N.Y. 1961), the original complaint was not served on the defendant until after the amended complaint had been filed; that court held that the amended complaint was the one that had to be served. Here the original complaint was served on Vesco before the amended one was filed. *Phillips* does not suggest that judgment may not be had on a properly served complaint.

Hutchins v. *Priddy*, 103 F. Supp. 601 (W.D. Mo. 1952), does contain some language that might be helpful to appellant, *see id.* at 606, but it was decided under local state rules, rather than the Federal Rules, and contains no analysis of the considerations we find to be decisive *infra*. To the extent that *Hutchins* is inconsistent with our analysis, we decline to follow it.

It is the rule in this circuit that, "after the filing of [an initial] complaint, the action remains pending in an inchoate state until service is completed . . . ." *Messenger* v. *United States*, 231 F.2d 328, 329 (2d Cir. 1956); *see* 2 *Moore's Federal Practice* ¶ 4.09, at 1024-25 (2d ed. 1975). This rule implies that an amended complaint, at least one that must be personally served pursuant to Rule 5(a), is also in an "inchoate state" until served. It would make little sense to hold, as appellant urges, that a complaint in such a state supersedes a properly served complaint. Such a holding would leave a case in a state of suspended animation in the interim between filing and service of the amended complaint, with the court perhaps even lacking personal jurisdiction over the defendant.

Such a holding would also introduce a substantial risk factor into a plaintiff's decision whether to amend his complaint. A plaintiff considering amendment would have to evaluate the likelihood that the amended pleading could actually be served on the defendant or defendants. If it appeared that such service on even one defendant would be difficult—as was clearly the case here, where ICC had had great difficulty serving its original complaint on Vesco—the plaintiff might well have to decide not to file an amended complaint, since failure to serve it would, under the rule urged by appellant, leave the plaintiff, which had once had an effective complaint (the original), without any remaining effective complaint on which it could obtain judgment. It seems plain that the introduction of such a consideration into the decision whether to amend, requiring the plaintiff in effect to gamble on the likelihood of obtaining service, would discourage amendments and thus would be inconsistent with the amendment policy underlying the federal procedural system, *see* Fed. R. Civ. P. 15(a); 6 C. Wright & A. Miller, *supra*, §§ 1471, 1473. Accordingly, in the circumstances of this case, we can-

not hold void the judgment entered on the original complaint.

The Date of the Nunc Pro Tunc *Entry of Judgment*

Appellant next complains that the May, 1976, judgment, entered *nunc pro tunc* as of the date of the signing of the order imposing damages for the previously entered default (July 12, 1974), should have been entered as of the date of the actual filing of that order (July 16, 1974). Appellant does not here argue that merely the entry of judgment *nunc pro tunc* renders the judgment void, although it apparently planned to make such an argument in its untimely direct appeal and before us presented this argument as part of the "context" of its Rule 60(b) motion. Rather, it here contends that use of an allegedly wrong *nunc pro tunc* date amounted to the type of "mistake" by the court that requires vacation of the judgment under Rule 60(b)(1).

We believe that appellant's argument is based on a failure to appreciate the difference between Rule 60(a)[5] and Rule 60(b)(1). While the latter's reference to "mistake" has been held to include mistakes by the district court, *see Tarkington* v. *United States Lines Co.*, 222 F.2d 358, 360 (2d Cir. 1955) (Frank, *J.*); 11 C. Wright & A. Miller, *supra*, § 2858, at 176 (1973), a motion for relief from such judicial mistakes under Rule 60(b)(1) may not be made after the time for appeal has elapsed, *see Schildhaus* v. *Moe*, 335 F.2d 529, 531 (2d Cir. 1964), at least if the mistake alleged is of a substantive legal nature, *see* 11 C. Wright & A. Miller, *supra*, § 2858, at 178. If, on the other hand, the mistake alleged is of a "clerical" nature, "arising from oversight or omission," then a motion may be made only under Rule 60(a), which allows the court to correct such errors "at any time." Unlike the grant of a Rule 60(b) motion, however, the grant of a Rule 60(a) motion does not lead to relief from the underlying judgment, as is apparent upon comparison of the relevant language, *see* notes 1 and 5 *supra*. The time for appeal from the underlying judgment correspondingly dates from the original rendition of judgment in the Rule 60(a) context, whereas in the Rule 60(b) situation it dates from the entry of the amended judgment. *See* 11 C. Wright & A. Miller, *supra*, § 2871, at 257-58.

Appellant here is thus caught on the horns of a dilemma. It characterizes the mistake alleged as "significant," a term that may have been meant to imply that the mistake was substantive.[6] If so, however, appellant's own characterization indicates that the Rule 60(b)(1) motion must be rejected, because it was made after the expiration of the time for appeal from the judgment. If, on the other hand, the alleged mistake in date may properly be characterized as clerical in nature, as we believe to be the case, *see United States* v. *Roth*, 164 F.2d 575, 576-77 (2d Cir. 1948) (Swan, *J.*); *Continental Casualty Co.* v. *Little*, 152 F.2d 728, 729 (5th Cir. 1946), then appellant may seek a correction at any time by filing a Rule 60(a) motion. But appellant cannot in any case obtain that which is apparently its principal objective, a re-entry of the underlying judgment

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5 Fed. R. Civ. P. 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

6 Appellant's use of the term "significant" to describe the alleged mistake follows in its brief directly after a quotation of the district court's conclusion that "'this ground is not sufficiently substantive.'" Brief for Defendant-Appellant at 16.

so that an appeal therefrom may be taken. Accordingly, the entry of judgment *nunc pro tunc* as of July 12, 1974, even if erroneous, provides no basis for vacating the judgment.

District Court Discretion

Appellant's final point is that the district court abused its discretion by denying appellant's Rule 60(b)(6) motion, which essentially asked the court to vacate and then re-enter its May, 1976, judgment so that appellant could take a timely appeal therefrom. While any motion under Rule 60(b) is addressed to the discretion of the trial court, *see Altman* v. *Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972) (per curiam); *Sampson* v. *Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970); note 1 *supra* (use of "may" in Rule 60(b)), this discretion is especially broad under subdivision (6), because relief under it is to be granted when "appropriate to accomplish justice," *Klapprott* v. *United States*, 335 U.S. 601, 615 (plurality opinion of Black, *J.*), *modified on other grounds*, 336 U.S. 942 (1949); *see* 11 C. Wright & A. Miller, *supra*, § 2864, at 211-12. We find no abuse of discretion here.

In support of its argument, appellant points to certain equitable factors in its favor, including the absence of prejudice to appellee if an appeal from the judgment were now allowed, the length of the trial proceedings, the substantial monies at stake, and the virtual certainty that appellant intended to appeal from the judgment, *see Fidelity & Deposit Co.* v. *Usaform Hail Pool, Inc.*, 523 F.2d 744, 750-51 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Appellant ignores, however, equally compelling factors that militate against giving it another opportunity to appeal. Most importantly, the district court found that appellant had actual notice of the entry of judgment five days before the time for appeal expired and had construc-

tive notice at least some twenty days in advance. Appellant does not here challenge these findings, which led the district court to conclude that appellant's failure to file a timely appeal was not excusable. Appellant's situation thus contrasts sharply with that in the case it cites with regard to the above-listed equitable factors in its favor. In *Fidelity & Deposit Co.* v. *Usaform Hail Pool, Inc.*, *supra*, 523 F.2d at 751, a judgment was vacated under Rule 60(b)(6) because no party knew of the entry of judgment at the time it was entered and because counsel acted diligently in seeking to learn of the judgment. *Accord, Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 500 F.2d 808, 809-10 (D.C. Cir. 1974). Under the circumstances of this case, the district court could properly deny appellant's Rule 60(b)(6) motion.

Judgment affirmed.

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MEMORANDUM DECISION BY
JUDGE CHARLES E. STEWART,
FILED NOVEMBER 1, 1977

On May 27, 1976, an amended judgment was entered in this action in response to a May 13 remand from the Court of Appeals due to the absence of a Rule 54(b) of the Federal Rules of Civil Procedure ("F.R. Civ. P.") certification of finality in our July 16, 1974 judgment. Defendant Vesco & Co., Inc. ("Vesco & Co.") filed its notice of appeal from this amended judgment on July 7, 1976, nine days late. On August 4, 1976, plaintiff moved in the Court of Appeals to dismiss the appeal as untimely. Defendant then moved before this court on August 31, 1976 pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure ("F.R. App. P."), for

an extension of the time in which to file a notice of appeal on the ground of excusable neglect. On September 14, the Court of Appeals heard plaintiff's motion to dismiss and a cross-motion by defendant that the May 13 remand be reconsidered. The motion to dismiss was granted and the motion to reconsider denied. On September 15, the defendant moved this court to vacate the May 27, 1976 judgment pursuant to Rule 60(b) of the F.R. Civ. P. A hearing was held on both of the motions pending before this court on September 22, 1976, and a further conference was held on October 7 after which the parties submitted additional papers.

Plaintiff, in opposition, initially argues that defendant's motion to extend the time in which to file a notice of

appeal should be dismissed because the motion was not made within 60 days after entry of the judgment appealed from, as required by Rule 4(a). The Second Circuit, confronted with this very argument, recently held that

> "the filing of the notice of appeal within 60 days, coupled with a prima facie showing of excusable neglect, and the timely service of the notice of appeal on the opposing parties, constituted a sufficient manifestation on the part of appellants to permit the district court, in the exercise of its discretion, to treat the notice of appeal as the substantial equivalent of a motion to extend the time because of excusable neglect."
> Stirling v. Chemical Bank, 511 F.2d 1030 (2d Cir. 1975).

In the instant case, defendant filed, and served plaintiff with, its notice of appeal within 60 days of the judgment,

and made a prima facie showing of excusable neglect. Thus, we will exercise our discretion "to treat the notice of appeal as the substantial equivalent of a motion," and consider the substance of the motion.

First, defendant claims that it did not know that the judgment was entered on May 27, 1976. Defendant admits that its attorney saw the order signed on May 26 (Littman Affidavit, ¶3). Defendant apparently thought that the prevailing party entered a judgment, and that this party might delay entry so as to put off "the inevitable" appeal (Littman, ¶3). Defendant was entirely mistaken about the procedure in the federal courts where a signed order is sent directly from chambers to the clerk's office where it is entered in the docket shortly thereafter.

See Rules 58(2) and 79(a) of the F.R. Civ. P. Ignorance of the court's procedures is not "excusable neglect." Russo v. Flota Mercante Crancolombiana, 303 F. Supp. 1404 (S.D.N.Y. 1969); Nichols-Morris Corp. v. Morris, 279 F.2d 81 (2d Cir. 1960).

Second, defendant claims that it was not notified by the clerk's office of the entry of judgment as required by F.R. Civ. P. 77(d). This is contradicted by the notation "m/n" in the docket following the entry of the judgment on May 27, 1976. This notation is used by the clerk's office to indicate that notice has been mailed to the parties (Camhy Affidavit, ¶4). Even if notice were not mailed by the clerk, Rule 77(d) specifically provides that "[l]ack of notice of the entry by the clerk does not affect the time to

appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," where the sole ground for relief is "excusable neglect." In this case, but for defendant's apparent ignorance of the federal procedures for entry of judgment, it would have known that entry would immediately follow signing of the order, and a routine check with the docket clerk would have informed it that this procedure had been followed. We also note that notice of the order appeared in the June 8, 1976 issue of the New York Law Journal. Thus, even if defendant did not receive notice from the clerk's office, it should have known independently that the order was entered,

so any failure on the part of the clerk's office is not "excusable neglect." See Nicholas-Morris, supra at 83.

Finally, on June 24, 1976, five days before the 30-day time to appeal had expired, defendant was informed by the Court of Appeals Clerk, Daniel Fusaro, that the amended judgment had been entered on May 27, 1976 and that the previous appeal had been disposed of by the Court of Appeals by its May 13, 1976 remand. Defendant did not file notice within this five-day period although it indicated that it intended at all times to pursue the appeal (Littman, ¶11). Its only explanation for not filing is that it was "in a quandry . . . as to the proper avenue for further proceedings" (Defendant's August 30 Memorandum, p. 5).

However confusing the procedural posture of the case may have been earlier, we think that the Fusaro letter made it clear that defendant would have to institute a new appeal in order to have the Court of Appeals consider the other issues that defendant had raised, but which the Court of Appeals had not reached because of its decision to remand. Thus, we must conclude that defendant's failure to act was the result "of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction." Nichols-Morris, supra at 83.

Accordingly, we deny defendant's motion to extend the time in which to file a notice of appeal.

In the alternative, defendant has moved on several grounds that the judg-

ment be vacated pursuant to F.R. Civ. P. 60(b). Admittedly, defendant's primary interest in this relief is that it would give defendant a chance to pursue a timely appeal upon entry of a corrected judgment.

Defendant's main argument here rests on its contention that the May 27, 1976 judgment is void because it refers only to the original complaint, and not to the amended complaint which had been filed before the default against Rober L. Vesco ("Vesco") was entered.

A brief chronology of the key events relating to this claim is as follows. The original complaint was filed on June 7, 1973 and Vesco was served with summons and complaint on July 30, 1973. An amended complaint was filed on September 7, 1973 and service was pur-

portedly made on Vesco on October 24 and 25, 1973. In the meantime, on October 5, 1973, a default judgment was entered against Vesco on the original complaint. Pursuant to this default judgment, an inquest on damages was held which resulted in our July 16, 1974 judgment, awarding plaintiff $2,188,345.93. On April 4, 1975 an amended judgment was entered certifying the finality of the October 5, 1973 and July 16, 1974 judgments. The April 4 amended judgment was itself amended on September 15, 1975 in order to correct an error as to the date of the July 16, 1974 judgment. Plaintiff sought to satisfy some of its outstanding default judgments against Vesco through certain assets of Vesco & Co., and on August 22, 1975 this court held that Vesco & Co. was the alter ego of Vesco.

Vesco & Co. filed its notice of appeal on September 19, 1975 and on May 13, 1976, the Court of Appeals remanded to this court. Our May 27, 1976 judgment certified the finality of, and amended nunc pro tunc, the July 16, 1974 judgment.

All the proceedings and ensuing judgments against Vesco have clearly and consistenly been based on, and related back to, the original, not the amended, complaint. Defendant apparently had no quarrel with this when it filed its brief on appeal to the Second Circuit since it attacked the default on the basis of the adequacy of service of the original summons and complaint, but never raised the point it now presses. There are in our view, therefore, substantial equitable considerations tending to suggest that defendant should not be permitted to raise

for the first time at this very late hour, a procedural issue which could have been presented long ago. In any event, however, we find that defendant's contention is without merit.

The general rule is that once a pleading has been amended, and the amended pleading is complete in itself, it supersedes the original. See 3 Moore's Federal Practice §15,08[7] at 939 (2d E. 1975); Cicchetti v. Luccey, 514 F.2d 362 (1st Cir. 1975); La Batt v. Twomey, 513 F.2d 641 (7th Cir. 1975); Phillips v. Murchison, 194 F. Supp. 620 (S.D.N.Y. 1961). Defendant contends that the superseding effect takes place the moment the amended pleading is filed. While there is some language to this effect in some of the opinions upon

which defendant relies (see Cicchetti and Phillips, supra) none of them were directly concerned with, or addressed, the issue raised by the facts of the instant case. Here the amended complaint was filed before the default judgment on the original complaint was entered, but service was not made, if at all, until after entry of the default judgment. Under these circumstances, plaintiff contends that the mere filing of the amended complaint should not be held to have caused the original complaint to be superseded.

The relationship between filing and service of a complaint in the first instance is that filing properly commences the action, but

> ". . . commencement is merely the threshold to litigation; unless it is ultimately followed by proper service of original process, or defendant waives proper service, the potential jurisdiction which commencement invokes never ripens into actual jurisdiction." 2 Moore's Federal Practice §4.08 at 1024-5 (2d Ed. 1975)

We think that when an amended pleading is required to be served on a party, it similarly requires proper service in order to become effective as to this party. Thus, we conclude that if service is not, or cannot, be made of the amended pleading, it does not supersede the original. The question to be determined, therefore, is whether Vesco was properly served with the amended complaint.

Pursuant to Rule 4(i)(1)(E), service of the amended complaint was authorized by this court, on October 19, 1973, to be made as follows:

> "(i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) as to individual defendants, by leaving a copy of the summons and amended complaint herein upon the premises of such defendant's last known residence located in Nassau, Bahamas and mailing a copy thereof to such defendant at either the Post Office Box of such defendant or to the address of such last known residence of such defendant in Nassau, Bahamas. . . ."

In light of representations recently made to this court by counsel for plaintiff as to what information was available about Vesco's whereabouts in October of 1973, the terms of this order may not comport with the requirements of due process. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Milliken v. Meyer, 311 U.S. 457 (1940).

However, we need not decide this since we find that the method of service outlined by James Bondi in his November 12, 1973 Affidavit of Service does not comply even with the terms of our order, in that Bondi was not able to "leave" the papers at Vesco's last known residence.

The affidavit recounted that two persons, who had been authorized to effect service, went to Nassau, Bahamas and there located the last known residence of Vesco (Bondi Affidavit, ¶12). Two gardeners were present on the grounds of the residence, and they called a private security officer when the process servers identified themselves and stated their mission. After the security officer arrived, the process servers again identified themselves. The officer and

gardeners both refused to accept the papers, and the officer took photographs of the process servers. At this point, one server threw the papers over the wall onto the grounds, but the gardeners handed them back to the officer who in turn threw them back into the process servers' car (Bondi Affidavit, ¶¶13 and 14). While this attempt was thwarted by personnel on the grounds of this residence, there is no information that these persons were agents of Vesco, so the failure of the attempt cannot be imputed to Vesco's own efforts. Accordingly, we find that the amended complaint was not properly served and thus, that the amended complaint did not supersede the original, and that all the judgments properly relate to the original complaint.

Defendant's second ground for seeking to open the judgment is that the May 27, 1976 judgment "on its face, does not make sense" (Besser letter of September 15, 1976), if its references to the various counts of the complaint are read as relating to the original complaint. We have carefully compared the counts of the complaint and those enumerated in the May 27 judgment, and we conclude that the references in the judgment are accurate. Thus, we find that the judgment is "comprehensible" on its face.

Finally, defendant seeks to vacate the May ?7 judgment on the gound that the reference to a judgment having been entered on July 12, instead of July 16, 1974, was incorrect. We think that this ground is not sufficiently substantive to

merit our opening the judgment especially in view of the entire context of this motion.

Accordingly, we deny defendant's motion to vacate the judgment under Rule 60(b), as well as defendant's motion for leave to extend the time in which to file a notice of appeal.

November 1, 1977

SO ORDERED.

/s/ Charles S. Stewart
CHARLES E. STEWART
U.S.D.J.